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No. A-367

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IN THE

Supreme Court of the United States

JANUARY TERM, 1990

WALTER LEROY MOODY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. Does the principle of finality of criminal prosecutions take precedence over the rights of an individual wrongly convicted of a crime?

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Petitioner, Walter Leroy Moody, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled cause on June 13, 1989.

I.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals and denial of in banc hearing are attached as Appendix A. The opinions of the district court for Middle District of Georgia are attached as Appendix B.

II.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was filed on June 13, 1989; motion for rehearing in banc denied August 21, 1989; Order extending time for filing petition for writ of certiorari through January 18, 1990 granted November 15, 1989, attached as Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in Jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added.)

The Sixth Amendment of the United States Constitution provides:

> *In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.* (Emphasis added.)

IV.

STATEMENT OF FACTS

In 1971, Petitioner, Moody, was living in Macon, Georgia and attending evening classes in Atlanta. There he met Gene Wallace, a seventeen year old boy, who sat in on classes while his friend attended. During this time, an old sports car of Moody's was repossessed by an Atlanta man, Tom Downing.

When Wallace learned of the repossession, he suggested he and one of his friends send Downing a note demanding money with a firecracker enclosed. Wallace reasoned that if one note was mailed from Norfork, Virginia and the other from Houston, Texas by him and his friend, at a time when Moody was in Macon, Moody could not be implicated; Downing, however, would suspect Moody intended to harm him and would be scared into sending Moody money.

Moody, age 39, viewed Wallace as an ignorant, immature "pot head" and did not take him seriously. Moody rejected Wallace's plan.

Through some detective work, Wallace located Moody in Macon a week later. Wallace told Moody he and his friend had completed one of the two packages he wanted to

send to Downing, and he tried to persuade Moody into participating.

Moody got angry and demanded Wallace leave him alone. Wallace became hostile and threatened to make Moody dispose of the package if he prevented Wallace from using it.

Moody promptly reported the matter to his attorney, Andrew McKenna. Neither Moody nor McKenna felt Wallace actually had an explosive package but McKenna told Moody to report any further contact by Wallace to the police. Moody never saw Wallace again.

One year later, Wallace told his girlfriend, Julie Linn, that he was going into the service but first wanted to take a package to Macon to "make Moody get rid of it."

On Sunday, May 7, 1972, Wallace accompanied by his girlfriend, Linn, placed the package in Moody's home while the Moodys were away. At the time, Wallace told Linn he was leaving the package to "make" Moody get rid of it.

Approximately one hour later, Moody's wife entered their home alone. She noticed a package that had not been there several hours earlier when the Moodys left. She opened the package; it exploded resulting in her being hospitalized.

At the time, Moody and his baby were in Fort Valley, Georgia visiting his mother. Moody was not in the house when Wallace left the package in his home and did not reenter the house until about one hour after the package exploded.

After the police arrived, Wallace and Linn drove by Moody's home again. Wallace saw the police and told Linn the package he had left had blown up. Later, Linn began to question Wallace about the explosion. Wallace got upset; he beat Linn and threatened to harm her if she ever revealed what she had seen. Linn, who had been partially paralyzed in an auto accident years earlier, was unable to defend herself and was terrified by Wallace.

Shortly after the explosion, a neighbor called Moody in Fort Valley, and he returned home. Moody immediately gave law enforcement people permission to search the house and remove all evidence.

Since a year had passed without Moody having heard from Wallace, Moody had no idea Wallace was involved. Instead, Moody suspected an irate customer of his from Florida.

The day following the explosion, investigators reconstructed the package and learned it had been addressed to Downing. They contacted Downing and learned he had repossessed a car from Moody a year earlier. But they also learned Moody had never expressed any desire to reclaim the car and had never displayed any hard feelings toward Downing.

Several days after the explosion, Moody asked the investigators if they had been able to reconstruct anything from the physical evidence. The investigators lied and said no. At this time, Moody was already a suspect.

Had the investigators been truthful and told Moody the package was addressed to Tom Downing, Moody could

have told them Wallace was responsible. Their lies caused Moody to continue to suspect his former customer in Florida.

To convict Moody of "constructive possession of a destructive device" the investigators had to show that Moody *knew* the package was in his home and that he *willfully* allowed it to be there.

The only evidence that indicated Moody may have known the package was in his home, however, was the fact it was addressed to Tom Downing. Not satisfied with this, the investigators falsified evidence to indicate Moody made the device in his home and therefore willfully and knowingly possessed it.

They claimed they found wire in Moody's workshop that was identical to that used in the bomb. Later, they admitted they had not done sufficient test on the wire and could not say the two were similar.

They claimed tool marks showed Moody's tools had been used to make the bomb. Later they admitted none of Moody's tools' marks were on the bomb.

They claimed gunpowder had been found in a room other than where the explosion occurred showing that to be where the bomb had been assembled. Later, they admitted the gunpowder was not there when they first examined the house and was actually unburned residue from the bomb dropped during clean up.

Later, they also admitted that since Moody had been a suspect since the day after the explosion, they never dusted the house for fingerprints to detect an intruder and never

canvassed the neighborhood to determine if the neighbors had seen any unfamiliar person enter Moody's house.

Moody was arrested on May 23, 1972 but still did not learn the package had been addressed to Downing until the magistrate's hearing on May 30th. Moody then promptly told his attorney, Manley Brown, about Wallace.

At said hearing, the government stressed their desire to try the case at a special term on June 26th. Brown indicated he would need more time to investigate and get necessary expert testimony. Later, Brown refused to represent Moody because Brown felt the court would not give him adequate time to prepare the case.

The court then appointed an attorney to represent Moody. Moody promptly told said attorney about Wallace and Moody's previous conversation about Wallace with attorney, McKenna. Appointed counsel refused to do any investigation, refused to consult expert witnesses, refused to confer with Moody in jail and refused to answer Moody's letters.

On July 4, 1972, Moody's wife had been released from the hospital and visited him in jail. She told Moody when she returned home she learned their home had been broken into and two anonymous letters had been delivered by mail to their home.

The first letter had been mailed from Houston, Texas on June 15, 1972, the city from which Wallace wanted to send a package to Downing. It stated:

> "You would have plenty of money if you had done what we said. Now all you have is a messed

> up wife. You screwed us, we screwed you. Hope the bitch dies."

The second letter was mailed on June 26, 1972 from Atlanta, the city where Wallace lived. It stated:

> "Heard about your arrest chicken. You know now we can get you or your family next week or next year. Keep quiet and live."

Moody's wife also told him someone repeatedly had followed her from work in a red, two door Ford, the same kind of car driven by Wallace.

Moody's wife said she reported everything to appointed counsel, and he did not seem interested. Therefore, on the same day, July 4th, Moody wrote a letter to the court complaining about appointed counsel's failure to investigate. Moody advised the court of the threatening letters, the break-in and that his wife was being followed.

The court responded to Moody's concerns on August 29, 1972, at a bond hearing. The court said:

> ". . . . Mr. Moody, let me point out one thing to you. Of course, you are furnished an attorney by virtue of the benevolence of the congress of the United States and of the law of the United States. Now there is not an unlimited amount of money with which to pay a court appointed attorney. That is not the attorney's fault. It is not the Court's fault, but it is just a matter of common sense that an attorney has to bear in mind, in representing you, the maximum amount that he can be paid by this court, and he cannot, under that limited amount, come by and see you with the regularity that I know you would like for him to see you and

> confer with you. You have to keep that in mind and try to be, yourself, somewhat reasonable about what you call upon Mr. Mann to do. And you also need to bear in mind that when you get a lawyer to represent you that you need to rely upon him to decide what is to be done for you, because, you see, you are not a lawyer. . . . So just keep those things in mind in corresponding with the court and making your request of Mr. Mann. He'll look after you but you are going to have to let him run the show."

The court did not ask appointed counsel any questions about why he was not investigating the case, why he was not seeking expert testimony, why he had not turned the threatening letters over to the police, if he had tried to determine who broke into the Moody home or who was following Moody's wife.

Because of the court's disinterest regarding counsel's lack of effectiveness, Moody sought to dismiss appointed counsel and retain private counsel. Moody wrote many letters advising the court and said counsel of his desire to retain private counsel. They were all skillfully ignored or otherwise defeated. Moody even filed a pro se motion to dismiss counsel. It was properly received by the clerk's office but the court refused to allow it to be filed, notwithstanding the fact the court allowed Moody's other pro se motions filed.

Moody's case had been assigned to a judge just appointed to the bench. From the time of Moody's arrest to the time of trial, said judge bungled the case to the point where he voluntarily recused himself minutes before the trial and had the senior judge conduct the trial. This empty gesture,

however, did not correct the irreparable harm done by the court's failure to require appointed counsel to provide effective investigation and preparation. On October 16, 1972, Moody was forced to trial with an unprepared and ineffective counsel.

Because no investigation had been done regarding the threatening letters and the break-in of Moody's home, his wife was afraid Wallace would kill her and their baby if she testified. Therefore, Moody's wife refused to testify.

The denial of Mrs. Moody's testimony prevented the jury from knowing the package had been placed in the Moody home while Moody was away and had exploded prior to his return.

Appointed counsel had made no effort to locate Wallace. Therefore, he could not be classified as an unavailable witness. This fact allowed the government to successfully use the objection of hearsay to prevent Moody from explaining Wallace's scheme and threats to the jury.

Appointed counsel refused to subpoena Moody's former attorney, Andrew McKenna, to testify. Therefore, the jury was prevented from knowing Moody had reported Wallace's scheme and threats to an attorney over a year earlier.

Appointed counsel did not determine who had removed the two threatening letters from Moody's mailbox and subpoenaed the wrong witness. Therefore, the letters were not allowed into evidence, and the jury never realized that Moody's wife did not testify for fear of her life.

Appointed counsel presented no theory of defense during his opening statement and failed to develop one during the trial. The trial was virtually over and Judge Bootle, an experienced and distinguished jurist, had no idea what theory of defense appointed counsel was presenting.

Judge Bootle asked said counsel:

"What is his defense?"

The jury rejected the government's fabricated evidence and determined Moody did not make the bomb.

Without knowing of Wallace's scheme and prior threats or that Wallace had placed the package in the Moody home in their absence, with it to explode before Moody's return, the jury found Moody guilty of "constructive possession" of a destructive device.

Moody asked appointed counsel to seek a new trial based upon the fact that counsel had not done the investigation necessary for the essential facts to be presented to a jury. Said counsel refused.

Moody was sentenced to five years in prison.

On September 17, 1973 Moody filed a Motion to Vacate Sentence and Set Aside Judgment of Conviction pursuant to Title 28, U.S.C., Section 2255.

Said motion in part stated:

> "Petitioner complains that he was denied the right to have the effective assistance of competent counsel and thereby done substantial harm, and his constitutional rights were violated."

In thirty-seven typed pages, Moody clearly stated how said counsel was ineffective. Eight of these pages clearly indicated counsel's failure to investigate the case and the dire consequences of said failure.

Moody was denied an evidentiary hearing on the 2255 motion and thereby prevented from developing the material facts.

Moody served his five year sentence and returned to being a productive citizen.

Years after Moody had been convicted, Linn moved back to Atlanta. Her infrequent nightmares about Wallace became more troublesome. Finally, she told her mother about Wallace and the explosion.

When her mother learned the police were involved, she insisted they go to the Macon library to read the old newspaper reports. As a result, they learned Moody's wife had been injured in the explosion. They felt obligated to contact Moody's wife to tell her what they knew about Wallace.

By tracing Moody's relatives, Linn finally reached Moody. Since Moody and his wife had divorced, Linn could not talk to her. She refused to give her information to Moody because she had read he had been sent to prison, and she was afraid he would take legal action against her.

Finally, after Moody agreed to sign an unconditional release prepared by her attorney, Linn told Moody's attorney the facts about Wallace.

It was not until Moody read Linn's statement that he knew who had placed the explosive package in his home.

Moody's attorney was a former assistant federal prosecutor in Atlanta. He requested that Moody and Linn take a polygraph test to substantiate the facts he had. Moody and Linn submitted to the test and the results indicated no deception.

Moody's attorney then filed a petition for writ of error coram nobis in the trial court seeking to have the conviction set aside and the record expunged.

The trial court ruled Moody was not denied effective assistance of counsel and the newly discovered evidence would not have likely resulted in a different outcome.

The court of appeals affirmed the trial court's ruling.

V.

REASONS FOR GRANTING THE WRIT

This case provides the opportunity for this Court to offer guidance to prevent unacceptable abuses arising from the finality of convictions principle.

To understand the orders of the lower courts, one must first understand their motives and methods. The key to such an understanding is provided in the order of the appeals court,

> "More troublesome still, such a remedy would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal convictions."

The actions of the lower courts appear irrational unless one understands their controlling motive is to preserve finality of criminal convictions at all cost.

This principle is not one our founding fathers would proudly proclaim. It is one the courts attempt to justify by wrongly claiming society's compelling interest requires it.

Society has a compelling interest in seeing its members are not wrongfully imprisoned or denied relief, and it is for that reason courts are instituted. It is the court that has the compelling interest in finality of criminal convictions, and the advantages to the court are obvious. The principle allows the courts to "cover up" abuses resulting from their failure to properly do their job, and it reduces their work load by discouraging the abused from seeking justice.

As this case demonstrates, if finality of a criminal conviction is put into jeopardy by the facts of a case, those facts will be changed or ignored by the court. If finality is jeopardized by reason, then reason will be perverted by the court. If finality is jeopardized by the law, then the will of the court will take precedence over the law.

When confronting finality of criminal convictions, the truth of the matter is, the truth does not seem to matter.

In pursuing finality, the courts have become "Masters of Deceit" and compromised their integrity.

The resulting abuses are not unlike those that prompted John Locke to write the chapter on Tyranny in his *Second Treatise on Government*, and they have given new meaning to the words of Thomas Jefferson found in our Declaration of Independence:

> "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only

> by repeated injury. A prince whose character is thus marked by every act which may define a Tyrant, is unfit to be a ruler of a free people."

Petitioner has spent approximately fifteen thousand dollars to have attorneys call the true relevant facts and circumstances of Moody's wrongful conviction to the attention of the courts via petition for writ of error coram nobis, only to have the truth skillfully distorted beyond recognition.

Said writ of error coram nobis was based upon two contentions:

First, court appointed counsel refused to investigate Moody's case or properly prepare for the trial resulting in Moody's constitutional right to effective counsel being violated and

Second, newly discovered evidence fulfilling the error coram nobis requirements would likely have resulted in a different outcome.

The lower courts' preoccupation with finality prevented these contentions from being properly evaluated as shown herein.

1. INEFFECTIVE COUNSEL

Leslie Harris, Legislative Counsel for the A.C.L.U., recently announced on national television that the courts' failure to provide indigent defendants with "competent" counsel was a *national disgrace*. (Emphasis added.) This problem has become so pervasive, ethical attorneys are publicly announcing their disgust. Words cannot adequately express the consequences such abuses have on defendants.

The far reaching social implications of this problem calls this Court to provide guidance requiring actual compliance with *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

As the trial court in the case sub judice properly stated:

> "Under the *Strickland* test, the complaining party must show both that the representation falls below an objective standard of reasonableness, and that a reasonable probability exist that absent the attorney's errors, the result of the proceeding would have been different."

However, the court then took a position that totally negates the function and purpose of a jury trial. The court said:

> "Assuming petitioner's contentions are true, the court cannot find that had the attorney investigated, a reasonable probability exists that the results of the trial would have been different. First, it is likely that the attorney could not have found Wallace even had he looked. Assuming Wallace had been found, it is even more likely that Wallace would have exercised his fifth amendment right to refuse to testify, or given false testimony to exonerate himself."

Supported by the above reasoning, the court stated:

> "... the court finds Petitioner has failed to carry his burden of showing ineffective assistance as set forth in Strickland."

A profound difference exists between the trial court's reasoning and that expressed in *Black's Law Dictionary* relative to a fair and impartial trial. *Black's* states:

> "A fair and impartial trial by a jury of one's peers contemplates counsel to look after one's defense, compulsory attendance of witnesses, if need be, and a reasonable time in light of all prevailing circumstances to investigate, properly prepare, and present the defense. One wherein defendant is permitted to be represented by counsel and neither witnesses nor counsel are intimidated. One wherein no undue advantage is taken by the district attorney or any one else."

People v. Nationwide News Service, 172 Misc. 752, 16 N.Y.S. 2d. 277, 279.

Wallace was the perpetrator of the crime for which Moody was tried. It would be difficult if not impossible to overstate the importance of investigating him. To conclude that no investigation is needed because your findings are not guaranteed in advance is neither rational nor just.

Wallace, at the time of the offenses alleged against Moody, was seventeen years old. He may have had a birth certificate, a drivers license, a telephone, a medical history, a criminal record or utility records. He had friends who were still attending school in Atlanta that Moody could identify by sight.

Wallace's fingerprints could have been on file. If the threatening notes sent to Moody's wife had been checked for fingerprints, they might have conclusively tied the notes to Wallace.

Moody's wife had been hospitalized for over a month from what Moody and his wife felt was a bomb placed in their home by Wallace. In addition, they had received notes, believed to be from Wallace, threatening to kill them if they did not keep quiet. The court and the attorney knew these facts two months before the trial.

It should not have been necessary for the threats to have been consummated through the murder of Mrs. Moody and her child for the court to conclude that an investigation was needed.

It is true that had Wallace been found, he probably would have lied. It is also true that had he been found Julie Linn may have come forward. In any event, Wallace's presence at the trial would have allowed Moody to relate all of the relative facts and circumstances to the jury without being hamstrung by objections to hearsay from the prosecutor.

It was Moody's right to have the jury compare his credibility to that of Wallace's. To try to mitigate the importance of this right by saying Wallace would probably have lied is unjust.

Even had Wallace not been found, proper investigation would have allowed him to be considered an unavailable witness. This circumstance would have allowed Moody to advise the jury of the relevant facts concerning his relationship to Wallace. In reality, the hearsay objections prevented Moody from presenting the jury with a theory of defense.

In addition, proper investigation would have shown that a year earlier Moody had reported to his attorney,

McKenna, the fact that Wallace had threatened to make him dispose of an explosive package. Such investigation would have required subpoenaing McKenna. Instead, Moody was denied his constitutional right to call witnesses in his behalf.

Proper investigation would have resulted in the right person having been subpoenaed to introduce the threatening notes mailed to Moody's wife. In addition to Moody's and McKenna's testimony about Wallace, the jury would have known through said notes that someone was attempting to prevent the Moodys from testifying.

A proper investigation would have restored to Moody's wife some sense of confidence in the proceeding and have resulted in an atmosphere of calm in which witnesses could deliver their testimony without fear and intimidation. Moody's wife would have then testified showing that Moody was away when the package was placed in their home and did not return until it had exploded. Such testimony was essential to a fair trial because it showed Moody could not have had knowledge of possession. Without knowledge of possession, there cannot be willfulness of possession.

The extent to which the trial court went in defense of finality is shown by comparing quotations from the court's orders with the record and reason.

The court states:

> "The court notes, however, that the only evidence of any such failure to investigate is Petitioner's own statement to that effect."

Yet the court, in the same order, summarized the affidavit of Moody's wife, Hazel. In said affidavit, she stated she refused to testify at the trial because of counsel's failure to investigate the threats made against her and her baby. The court was aware of that affidavit and its contents.

The court also knew counsel was paid by the government, and the record showed *no* money had been allocated or paid for investigation.

In addition, the court knew the trial itself showed counsel had not properly investigated the case. Counsel subpoenaed the wrong witness which prevented him from entering the threatening letters into evidence. Also, he failed to make any effort to locate Wallace, thereby preventing Wallace from being considered an unavailable witness. As a result, objections to hearsay denied Moody from presenting a theory of defense.

There was an abundance of evidence showing that counsel had not properly investigated the case, and the court was well aware of it.

The court went on to state:

> "The record is devoid of any mention that petitioner informed his attorney of the identity of the alleged perpetrator."

This statement simply is not true. Moody's letter of July 14, 1972 to counsel is part of the record. It states in part:

> "We must find Gene Wallace and we have got to get our investigators to do it."

However, even if Moody had been unable to name the perpetrator, counsel would have had a duty to investigate. The government does not refuse to investigate a crime because the perpetrator is not named in advance for them.

In the following quotation, the court uses a false statement followed by subtle word substitutions to achieve its goal.

The court states:

> "If, in fact, Petitioner never gave the *name* of the alleged perpetrator to his attorney, the attorney cannot be said to have fallen below a standard of objective reasonableness for failing to investigate a *story* of which he was not apprised." (Emphasis added.)

As previously stated, the record shows Moody advised counsel of Wallace's name by the letter of July 14, 1972. Therefore, it was not just for the court to advance an argument based upon a supposition contrary to fact. The court went further by treating the word *story* and *name* as though they had the same meaning.

In other words, the court, by false statement, sought to establish that the record did not show Moody advised counsel of the name Wallace.

Then by equating the word *story* with *name*, the court wrongfully attempted to create the impression that Moody's alleged failure to *name* Wallace was in effect a failure to *reveal* the story.

The record shows that on many occasions both counsel and the court were timely apprised of the story, and the court was well aware of same.

It is important to note that the appeals court denied Moody relief due to ineffective assistance of counsel based upon an error of fact. The court stated:

> "Moody asserts, simply, that 'the new evidence establishes the ineffectiveness of trial counsel.' . . . Moody, however, was aware of the true basis of this contention at the conclusion of the trial. This being so, he should have articulated his claim of inadequate investigation along with the other allegations of ineffective assistance raised in his habeas corpus petition. Moody, unlike the petitioner in *Morgan*, has not proved that sound reasons exist for this procedural default. Therefore, there having been another remedy available for the sixth amendment violation alleged, Moody cannot now have his conviction vacated via the extraordinary writ of error coram nobis."

Moody's habeas corpus petition was not part of the record reviewed by the court of appeals and the court wrongfully presumed that Moody had not articulated his claim of inadequate investigation by appointed counsel.

Moody articulated his claim of inadequate investigation in eight typed pages of said habeas corpus petition and same is attached hereto as Appendix D.

It is equally important to note that no evidentiary hearing was granted in reference to Moody's habeas corpus petition in compliance with *Kaufman v. United States*, 394

U.S. 217. Moody was thereby denied the right to adequately develop the material facts relative to his claims.

What constitutes an objective standard of reasonableness must be determined in part by the possible severity of the punishment upon conviction. Representation that would be reasonable regarding a $5.00 worthless check charge would not be reasonable where the defendant faced three felony charges that could result in thirty years in prison and a thirty thousand dollar fine. This petitioner was faced with just such charges. No intellectually honest person would contend such circumstances did not warrant through investigation.

2. NEWLY DISCOVERED EVIDENCE

The trial court and the court of appeals concluded the newly discovered evidence presented by Linn was not so compelling that had it been presented to the jury, Moody likely would have been acquitted.

The trial court, in supporting its denial of relief, stated in part:

> "At the trial a government expert testified that the gunpowder and wire found in connection with the bomb were similar to gunpowder and wire found in Petitioner's home. The expert also testified that the wire cutters found in Petitioner's home were determined to have been the wire cutters used in the making of the explosive device."

It should be noted that the judge who wrote the above decision was not the trial judge but another newly appointed judge.

The above quote was copied from the government's reply and shows just how little the court knew about the facts of the case. The trial transcript clearly shows that the government witnesses admitted they had done no physical testing of the wire and could not say it was similar; that none of Moody's tools had made any marks found on the bomb and that the gunpowder in question was unburned residue from the bomb itself.

The truth about the above facts was pointed out to the court together with the fact that the jury rejected said facts when they determined Moody had not made the bomb.

Why then would the court ignore the facts in the record and a jury's verdict of acquittal to create the false impression that considerable evidence tied Moody to the bomb.

The most obvious reason is, it was a wrongful attempt by the court to diminish the importance of the newly discovered evidence.

The only fact tying Moody to the bomb that was not fabricated by the government was that the package was addressed to Tom Downing.

The jury recognized the government's fabrications as such when they acquitted Moody on the charge of construction of an explosive device.

It is, therefore, improper for the court, at this point, to ignore the trial transcript and record of acquittal in order to reuse rejected fabricated evidence to diminish the import of the newly discovered evidence.

The trial court also indicated it "felt compelled" to call Linn's mother as an additional witness. In reading the resulting transcript, two things are disturbingly apparent: first the questions are very leading and second, they concern trivial events unrelated to the newly discovered evidence.

The court centered its attention on where Linn and her mother obtained the change used to locate Moody by pay telephone a year earlier. The court stated:

> "Julie Linn testified that she and her mother had rolls of quarters when they began making phone calls in an attempt to track down Petitioner, while the mother testified they had "pocketfuls of change."

This indication of discrepancy, as well as the other cited by the court, are not supported by the transcript. Linn's mother did not say they had pocketfuls of change. She said, "I don't remember." It was the court that said, "Did you have pocketfuls of change?" and the court wrongly attributed its statement to Linn's mother.

It appears the reason for calling Linn's mother was to wrongfully create the impression that Linn was not a credible witness even though she and Moody had successfully corroborated their testimony with polygraph test results. See Appendix E and F.

In taking the above action, the court wrongly assumed the position of assistant prosecutor.

To determine the true intent of the court, one must only note that said court did not feel compelled to call Moody's

appointed trial counsel to determine why *no* investigation was conducted.

When considering the significance of the newly discovered evidence, both courts were controlled by the same desire to deny relief in the interest of finality.

In objectively considering if the newly discovered evidence would likely have resulted in an acquittal, one must bear in mind the essential elements of the crime.

For Moody to have been guilty of the crime, he must have knowingly and willfully possessed the destructive device. Any information that would raise a reasonable doubt in the minds of the jury relative to whether Moody knowingly and willfully possessed the package would likely be sufficient to result in an acquittal.

It should be noted that special training is not needed to determine if said evidence is likely to create a reasonable doubt. All that is necessary is that degree of common sense possessed by jurors.

The evidence presented by Linn would have shown for the first time:

1. That Wallace placed the package in Moody's home,
2. The precise time he placed the package,
3. What his motive was for placing the package,
4. That the package was in Moody's home less than two hours before it exploded,

5. That he admitted it was his package that exploded and

6. That the package was placed in Moody's home while he was away and exploded before he reentered the house.

In considering the significance of the above information, one must view it in the light of the trial. When viewed in that light, one notes the jury rejected the government's fabricated evidence and acquitted Moody of the charge of construction. The only evidence left to indicate Moody may have willfully and knowingly possessed the package was the fact it bore the address of Tom Downing.

It is not reasonable to conclude that such a large body of essential information going directly to the heart of whether Moody knew the package was in his home would not have raised a reasonable doubt in the minds of the jury. In the presence of such a doubt, the jury would have had a duty to acquit.

The foreman and one other member of Moody's trial jury were present at the hearing when Linn testified. Both signed affidavits, that are part of the record, indicating the jury had not previously heard the information and Linn was a credible witness. Both indicated at the time that the newly discovered evidence indicated Moody did not have knowledge that the package was in his home. Of course these are just honest people interested in justice, they have not been trained in the finality principle.

Linn's testimony makes it clear that many facts which could have exonerated Moody existed at the time of the

trial. It also shows that Moody's 1973 habeas corpus petition, claiming appointed counsel's failure to investigate prevented the material facts from being developed and thereby rendered the trial such a farce as to be null and void, had substantial merit.

CONCLUSION

When an individual elects to conduct his life within the confines of the law, he earns the inalienable right to have that fact known to society.

Whether this Court elects to protect that right will have profound social consequences; for in the absence of such protection, not only are citizens subjected to wrongful loss of freedom but also one of the main incentives for them to be law abiding, the protection of their reputations, is removed.

An objective consideration of either question presented by Petitioner shows relief is not only warranted but is required.

Respectfully submitted,

WALTER LEROY MOODY, JR., *Pro Se*

6414 Skyline Drive
Rex, Georgia 30273
(404) 474-6673

Appendix A

Walter Leroy MOODY, Jr.,
Plaintiff-Appellant,

UNITED STATES of America,
Defendant-Appellee.

No. 89-8333.

United States Court of Appeals,

Eleventh Circuit.

June 13, 1989.

Appeal from the United States District Court for the Middle District of Georgia.

Before KRAVITCH and COX, Circuit Judges, and MORGAN, Senior Circuit Judge.

COX, Circuit Judge:

Walter Leroy Moody, Jr. appeals the district court's denial of his petition for the writ of error coram nobis in which he seeks relief from a 1972 conviction for willfully and knowingly possessing an unregistered destructive device. Prior to launching this collateral attack, Moody appealed his conviction, which was affirmed without opinion, *see United States v. Moody*, 474 F.2d 1346 (5th Cir.1973), unsuccessfully petitioned for collateral relief pursuant to 28 U.S.C. § 2255, and completed his five year term of incarceration and probation. In this petition, Moody's third post-trial attack on the conviction, he asserts two grounds for relief: (1) newly discovered evidence, which allegedly proves that he did not commit the crime, and (2) ineffective assistance of trial counsel.

THE WRIT OF ERROR CORAM NOBIS

In *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) (5-4 decision), the sharply-divided Supreme Court determined that the broad all-writs section of the judicial code[1] bestows on federal courts the authority to issue writs in the nature of coram nobis. *Id.* at 511, 74 S.Ct. at 252. The remedy provided by the writ, however, is of limited scope. *United States v. Mayer*, 235 U.S. 55, 69, 35 S.Ct. 16, 19, 59 L. Ed. 129 (1914). The *Morgan* majority, after examining those errors for which the writ was issued at common law, wrote: "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice."[2] 346 U.S. at 507-11, 74 S.Ct. at 250-53. Such compelling circumstances exist only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding it-

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[1] This section of the judicial code, unaltered since *Morgan*, provides as follows:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

28 U.S.C. § 1651(a) (1966). The all-writs section has its origin in the Judiciary Act of 1789, and its substance has persisted to the present. *Morgan*, 346 U.S. at 506, 74 S.Ct. at 250.

[2] This court's predecessor has phrased the standard thusly: "[T]he writ of error coram nobis should only be allowed to remedy manifest injustice." *Rener v. United States*, 475 F.2d 125, 126 (5th Cir.1973).

self irregular and invalid. *Mayer*, 235 U.S. at 69, 35 S.Ct. at 19. *See Morgan*, 346 U.S. at 512, 74 S. Ct. at 253. The first question then is whether Moody's allegation of newly discovered evidence is the fundamental type of irregularity for which the writ of error coram nobis provides a remedy.[3]

NEWLY DISCOVERED EVIDENCE

A claim of newly discovered evidence relevant only to the guilt or innocence of the petitioner is not cognizable in a coram nobis proceeding.[4] The Supreme Court seemingly resolved this issue in *Mayer* when, after noting the limited scope of the federal courts' authority to set aside final judgments for errors of fact, it stated:

> [I]n cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and *newly discovered evidence*, as well as where it is sought to have the court in which the case was tried reconsider its rulings, *the remedy is by a motion for a new trial*. . . .

235 U.S. at 69, 35 S.Ct. at 19 (emphasis added). Similarly, this court's predecessor twice has refused to consider allegations of newly discovered evidence when petitioned for the writ of error coram nobis. The petitioner in *Reid v. United States*, 149 F.2d 334 (5th Cir.1945), was denied relief

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[3] Because of the manner in which we dispose of Moody's ineffective assistance of counsel claim, we find it unnecessary to decide whether such a claim is cognizable in a coram nobis proceeding.

[4] We also hold that the evidence brought forth by Moody is not so compelling that, had it been presented to the jury, Moody likely would have been acquitted.

because his coram nobis petition was, in substance, merely an untimely motion for a new trial based on newly discovered evidence. *Id.* at 335.[5] Affirming the district court's dismissal of a coram nobis petition and, *inter alia*, its conclusion that "newly discovered evidence affords no entree to [the] writ," the court of appeals held in *United States v. Carter*, 437 F.2d 444 (5th Cir.1971), *aff'g* 319 F.Supp. 702 (M.D.Ga. 1969), that the petition failed to allege any error of fundamental Character. *Id.* at 445.

The rule that new evidence is not a claim for which the writ of error coram nobis may be issued is consistent with the limitations imposed on movants seeking a new trial based upon newly discovered evidence. Motions for new trials based upon new evidence must be filed within two years after final judgment. Fed.R.Crim.P. 33. Even when timely filed, such motions are greatly disfavored and, thus, are viewed with much caution. 3 C. Wright & K. Graham, Federal Practice and Procedure § 557 (1982). *See United States v. Metz*, 652 F.2d 478, 479 (5th Cir.1981). The writ of error coram nobis, therefore, cannot be available for new evidence only potentially relevant to a factual issue decided long ago by a jury for, if it were, the limitations of Rule 33 would be meaningless and the writ

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[5] *Accord United States v. McCord*, 509 F.2d 334 (D.C.1974); *Clark v. United States*, 506 F.2d 1050 (3d Cir.1974), *aff'g* 370 F.Supp. 92 (W.D.Pa. 1974); *United States v. Keogh*, 391 F.2d 138 (2d Cir.1968); *Azzone v. United States*, 341 F.2d 417 (8th Cir.1965); *Spaulding v. United States*, 155 F.2d 919 (6th Cir.1946); *Kelly v. United States*, 138 F.2d 489 (9th Cir.1943); *United States v. Gardzielewski*, 135 F.2d 271 (7th Cir.1943); *Fine v. United States*, 67 F.2d 591 (7th Cir.1935). *But cf., Hirabayashi v. United States*, 828 F.2d 591 (9th Cir.1987); *United States v. Scherer*, 673 F.2d 176 (7th Cir.1982); *United States v. Hedman*, 655 F.2d 813 (7th Cir.1981).

would no longer be extraordinary. More troublesome still, such a remedy would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal convictions. *See Morgan*, 346 U.S. at 511, 74 S.Ct. at 252.

INEFFECTIVE ASSISTANCE OF COUNSEL

The writ of error coram nobis has been issued to remedy certain violations of the sixth amendment. In *Morgan*, the uneducated, unrepresented nineteen-year-old defendant alleged in his coram nobis petition that he was not advised of his constitutional rights and neither competently nor intelligently waived counsel prior to entering his plea of guilty. The Court held:

> Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available *and sound reasons existing for failure to seek appropriate earlier relief*, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court. 346 U.S. at 511-12, 74 S.Ct. at 252-53 (emphasis added).

Moody asserts, simply, that "[t]he new evidence establishes the ineffectiveness of trial counsel." By failing to investigate adequately his protestations of innocence and his claim that another person, whom he named, was guilty of the crime, a fact Moody insists is proved by the new evidence, counsel allegedly denied the petitioner his sixth amendment right to effective assistance. Moody, however, was aware of the true basis of this contention at the conclusion of the trial. This being so, he should have articulated his claim of inadequate investigation along

with the other allegations of ineffective assistance raised in his habeas corpus petition. Moody, unlike the petitioner in *Morgan*, has not proved that sound reasons exist for this procedural default. Therefore, there having been another remedy available for the sixth amendment violation alleged, Moody cannot now have his conviction vacated via the extraordinary writ of error coram nobis.[6]

[6] Alternatively, we agree with the district court's conclusion that, assuming a claim of ineffectiveness is cognizable in a coram nobis proceeding, Moody has failed to carry his burden of showing ineffective assistance of counsel.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-8333

WALTER LEROY MOODY, JR.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 13, 11 Cir., 1989, ___F.2d___).

Before KRAVITCH and COX, Circuit Judges and MORGAN Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel not other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Apellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT

/s/ Cox
United States Circuit Judge

August 21, 1989

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEROY MOODY, JR.,	:	
Plaintiff	:	
vs.	:	CIV. ACTION
UNITED STATES OF AMERICA,	:	86-241-1-MAC(DF)
Defendant	:	CRIM.ACTION 8951

ORDER

In the above-referenced action, Walter Leroy Moody, Jr. asks this court to grant relief under an ancient common law remedy known as a petition for writ of error coram nobis. Granting the relief Petitioner Moody requests would have the effect of vacating his 1972 criminal conviction and expunging his record. Moody's Petition is based on two grounds: (1) that newly discovered evidence in the form of witness testimony establishes that he did not commit the crime for which he was convicted in 1972; (2) that the new evidence establishes the ineffectiveness of his counsel during his 1972 trial. Petitioner asks the court to grant relief in order to remedy the adverse consequences he is suffering from the loss of civil liberties due to his conviction.

At the request of Mr. Moody's counsel, the court held an expedited hearing on this Petition on February 1, 1988. At the hearing counsel for Petitioner called Julie Linn to the stand and elicited testimony from her in an at-

tempt to demonstrate Petitioner's innocence. Julie Linn's mother also was present at the hearing but was not called as a witness by either party. After listening to Julie Linn's testimony, the court felt compelled to call the mother as an additional witness. The court has heard the testimony of the witnesses and has carefully considered the pleadings and relevant authority in this area. For the reasons stated below, the court finds that Mr. Moody's Petition for Writ of Error Coram Nobis should be denied.

I. Background

On October 19, 1972 Petitioner was found guilty of willfully and knowingly possessing a firearm, a destructive device, which had not been registered as required by law. Petitioner was acquitted on two other charges, *i.e.*, willfully and knowingly making a firearm, a destructive device, without having paid the required tax for making a firearm, and willfully using an explosive to commit the offense of making a firearm.

On October 27, 1972 Judge Bootle, United States District Judge for the Middle District of Georgia, sentenced Petitioner to five years incarceration. The Fifth Circuit Court of Appeals affirmed the conviction in March of 1973. Petitioner's subsequent motion to vacate the sentence and set aside the conviction was denied by Judge Bootle. Petitioner spent approximately three years in prison and then successfully served the remainder of his sentence on parole.

Petitioner's indictment and conviction arose out of the events surrounding the explosion of a device in his home on May 7, 1972. Petitioner's wife was the only one in the house when the bomb exploded. Petitioner and his

son were visiting relatives at the time. Although Petitioner's wife was injured during the explosion, she made a complete recovery.

Petitioner's wife did not testify at her husband's criminal trial, but she did submit an affidavit on her husband's behalf. In the affidavit she stated that she did not testify because she was recovering from the injuries resulting from the explosion, and because someone had used threatening phone calls and other efforts to intimidate her into not testifying. She also stated that she could not trust the investigators to protect her if she were to testify at the trial.

In her affidavit Petitioner's wife stated that she was at home alone at the time of the explosion. Earlier in the day she had gone with her husband and son to visit relatives. Because of a domestic dispute, her husband had brought her home after the visit, and he and the son went to visit other relatives. While at home, she stated that she was looking for stamps in the bottom drawer of a filing cabinet when she noticed a package that had not been in the drawer earlier that day. She opened the package and it exploded. She concluded that the package had been left in their home while they had been away that morning.

Almost two weeks after the explosion the police arrested Petitioner based in part on evidence that the bomb had been in a package addressed to a car dealership that earlier had repossessed Petitioner's car. At the trial a government expert testified that the gunpowder and wire found in connection with the bomb were similar to gunpowder and wire found in Petitioner's home. The expert also testified that the wire cutters found in Petitioner's

home were determined to have been the wire cutters used in the making of the explosive device.

Petitioner maintained throughout the course of the investigation and trial that he was innocent of any wrongdoing. Petitioner alleges that he informed his lawyer that he suspected a man by the name of Gene Wallace of being responsible for placing the bomb in his house.

Petitioner's story was that he had met Wallace unexpectedly in a restaurant and had told Wallace that a car dealership in Atlanta had repossessed his car. Petitioner alleges that because he had made all the payments on the car, there was no basis for the repossession. Wallace told Petitioner he would go to the dealership to check on the car. Following his visit, Wallace contacted Petitioner and told him that although he had not found Petitioner's car, he knew how to get the car back for him.

A few days later Petitioner again met with Wallace in the restaurant. Wallace suggested that Petitioner use a bomb made by Wallace to extort the return of the car. According to Petitioner, he refused to go along with Wallace's plan.

Petitioner stated that although he informed his lawyer of the extortion plot suggested by Gene Wallace, the lawyer failed to investigate Wallace's possible involvement with the bomb. Petitioner contends that because his lawyer failed to pursue an investigation concerning Wallace, Petitioner did not receive effective assistance of counsel.

In March of 1986 a woman named Julie Linn contacted Petitioner at his home in Atlanta. Petitioner had never before met Linn. The story Linn told Petitioner, and the one she testified to at trial, is as follows:

Linn testified that she had been with Wallace on the day of the explosion. Linn was a teenager and living with her mother at the time. Linn stated that on the day in question, she and Wallace had driven to Petitioner's home. After realizing that no one was there but that the door was unlocked, Wallace took a small package into Petitioner's home. Linn stated that Wallace came out of the house without the package, and she and Wallace left together in his car.

Approximately twenty minutes later, Wallace told Linn that he had to go back and get the package because Petitioner had no telephone, and therefore, Wallace would not be able to contact Petitioner to tell him about the delivery of the package. When they returned to Petitioner's house, Linn testified that she saw people running towards the house, and Wallace exclaimed, "Oh my God, it blew up." Wallace and Linn then left.

Linn subsequently questioned Wallace as to whether the package he had left at Petitioner's home was the cause. of the explosion. After Wallace became noticeably upset because of Linn's continued questioning, Wallace stopped the car and began beating Linn. Wallace threatened Linn and told her never to talk to anyone about the incident.

Fearing Wallace and reprisals from her mother for her involvement with Wallace, Linn failed to tell anyone about the explosion and Wallace's threats. Several years

later, however, after having recurring but infrequent nightmares about the incident, Linn decided to tell her mother.

According to Linn's testimony, she and her mother were living in Atlanta at the time she decided to reveal her secret. Linn and her mother drove to Macon, Georgia, the city where the explosion occurred, and went to the library to investigate the explosion. When they arrived at the library, Linn and her mother read through old newspapers and eventually found some articles relating to the explosion. They then visited the site of the explosion, after discovering the address in the articles, and Linn recognized the site as being the house she and Wallace had visited in 1972. Linn realized at that time that Wallace had been responsible for the explosion.

Both Linn and her mother testified at the hearing. The Rule of Sequestration was invoked resulting in Linn's mother being out of the room while Linn testified. When the mother was called to testify, the court recognized certain discrepancies between the testimony of Linn and that of her mother.

II. DISCUSSION

Petitioner states that as a result of his 1972 conviction, he is prohibited from voting, holding public office, owning a firearm, and pursuing vocations of his choice. The basis for Petitioner's request for coram nobis relief is the newly discovered testimony of Julie Linn. Petitioner contends that Linn's testimony proves he could not have "knowingly possessed" the bomb, and therefore, his conviction was manifestly unjust. Petitioner also contends that the failure of his attorney to investigate Gene Wallace

resulted in ineffective assistance of counsel. Petitioner states that coram nobis is his only available remedy since he no longer is in custody, and since the time for requesting a new trial has run.

The writ of error coram nobis is an extraordinary remedy which was available at common law to correct errors of fact. *United States v. Morgan*, 346 U.S. 502, 507, 74 S. Ct. 247, 250 (1954). Coram nobis relief was allowed without limitations of time to correct errors that affected "the 'validity and regularity' of the judgment." *Id.*

Relief under a petition for writ of error coram nobis is of the same character as a remedy under 28 U.S.C.A. § 2255.[1] *Id.* at 503, n.4, 74 S. Ct. at 249, n.4. The difference between error coram nobis and section 2255 is that a writ of error coram nobis is available as a remedy to those convicted persons who have served their sentences and who no longer are in custody. *Id.*; *see Cline v. United States*, 453 F.2d 873 (5th Cir. 1972).

The Supreme Court has held that a district court's power to grant coram nobis relief arises from the all-writs section of the Judicial Code.[2] *Morgan*, 346 U.S. at 506, 74

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[1] 28 U.S.C.A. § 2255 allows a federal prisoner to challenge his conviction or sentence in the court in which he was sentenced. A prisoner may claim relief under section 2255 on any one of the following grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C.A. § 2255 (1981).

[2] The all-writs section states:

S.Ct. at 250. The court which grants coram nobis relief for a criminal conviction is the sentencing court. *Grene v. United States.*, 448 F.2d 720 (5th Cir. 1971). Although a district court has the power to grant a petition for writ of error coram nobis, such power must be restricted to those cases where the error was of the most fundamental character resulting in manifest injustice. *United States v. Mayer*, 235 U.S. 55, 35 S. Ct. 16 (1914); *Rener v. United States*, 475 F.2d 125 (5th Cir. 1973).

The Sixth Circuit has enunciated the standard for granting coram nobis relief as follows:

> A fair statement of the basis for granting a writ of error coram nobis is demonstration of (1) an error of fact (2) unknown at the time of trial (3) of a fundamentally unjust character which probably would have altered the outcome of the challenged proceeding if it had been known.

Flippins v. United States, 747 F.2d 1089 (6th Cir. 1984), *cert. denied*, ___ U.S. ___, 107 S. Ct. 2197 (1987). Petitioner contends the error of fact, who placed the bomb in the house, was unknown until 1986. He further contends that Linn's testimony would have provided a complete defense to the charge of knowingly possessing a firearm, and thus, would have changed the outcome of his trial.

(a): The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

28 U.S.C.A. § 1651 (1981).

A. Newly Discovered Evidence

The first ground for Petitioner's request for coram nobis relief is his contention that the newly discovered testimony of Julie Linn establishes his innocence. Petitioner argues that Linn's failure to come forward with this evidence before his criminal trial resulted in a manifest injustice, *i.e.*, the wrongful conviction of an innocent man.

Whether newly discovered evidence of the type involved in this case can be a basis for coram nobis relief seems to be an unsettled question. This court notes that one decision of the Seventh Circuit implies that newly discovered evidence can be the basis for coram nobis relief. *United States v. Scherer*, 673 F.2d 176 (7th Cir.), *cert. denied*, 457 U.S. 1120, 102 S. Ct. 2935 (1982). The *Scherer* court refused to grant coram nobis relief on the basis of the new evidence, however, holding that the evidence involved only a minor difference in dates in government documents used at the trial. *Id.* at 179. The court noted that the new information would have been used merely for impeachment purposes, and therefore, was not of such a fundamental character as to warrant coram nobis relief.

Although *Scherer* can be read to support the position that newly discovered evidence can form the basis for coram nobis relief, this court, citing *Mayer*, 235 U.S. at 69, 35 S. Ct. at 20, has stated that newly discovered evidence cannot be the basis for issuing a writ of error coram nobis. *United States v. Carter*, 319 F. Supp. 702, 705 (M.D. Ga. 1969), *aff'd*, 437 F.2d 444 (5th Cir. 1970), *cert. denied*, 403 U.S. 920, 91 S. Ct. 2238 (1971). The Supreme Court held in *Mayer* that a petitioner could not obtain coram nobis relief on the basis of newly discovered evidence once the term

of court had ended. More than forty years later, however, the court held that federal courts could grant a petition for writ of error coram nobis at any time after the conviction. *Morgan*, 346 U.S. at 512, 74 S. Ct. at 253. Although the *Morgan* Court did not hold that newly discovered evidence could be a basis for coram nobis relief, the Court did reaffirm its position that such relief is proper to correct errors of the most fundamental character.

Assuming that newly discovered evidence can be a basis for coram nobis relief, this court finds that Julie Linn's testimony is not of such a fundamental character as to warrant the relief requested by Petitioner in this case. Linn's testimony merely set forth evidence that would be subject to dispute during trial. The court notes that at Petitioner's criminal trial, the government presented substantial evidence linking Petitioner to the bomb. Moreover, Petitioner took the stand in his own defense and made an attempt to pin the blame on Gene Wallace.

Although Linn's testimony would have supported Petitioner's accusations against Wallace, this court cannot conclude that her testimony would have convinced any juror that Petitioner was innocent of the charges against him. Even if Linn's entire testimony could be taken as true, the government could have made a strong argument at trial that Petitioner knew Wallace was going to deliver the bomb. Petitioner's admission that the doors to his house were unlocked on the morning of the explosion could raise an inference that Petitioner knew Wallace would be bringing the bomb to Petitioner's house while Petitioner and his family were gone. Therefore, although Linn's story seems to imply that Petitioner did not know

about the bomb, it does not establish that fact. Indeed, even after hearing Linn's testimony, all twelve jurors could have believed Petitioner knew Wallace would be bringing a bomb on the morning of the explosion, and thus, Petitioner willfully and knowingly possessed the bomb. Because Linn's testimony does not establish Petitioner's innocence, the court finds that the failure to present this evidence at Petitioner's criminal trial did not result in a manifest injustice.

More importantly, the court had the opportunity to listen to and question the two witnesses at the hearing. The stories the witnesses gave conflicted on several points. For example, Julie Linn testified that she first disclosed the incident to her mother while they were living in Atlanta, while Linn's mother testified that Julie revealed the story to her in Wisconsin;[3] Julie Linn testified that she and her mother had rolls of quarters when they began making phone calls in an attempt to track down Petitioner, while the mother testified they had "pocketfuls of change"; and Julie Linn testified that they arrived at the explosion site around dark, while the mother testified they arrived at the site around 2:00 or 3:00 p.m. and arrived back in Atlanta at dark. Because of the extraordinary nature of this remedy, the court feels that where, as in this case, some question exists as to the credibility of the witnesses, the petition should not issue.

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[3] The court notes that Julie's mother wrote a letter to the court following the hearing in which she attempted to explain the conflict in her and Julie's testimony as to their location when Julie told her mother about the incident. The court has considered this letter, but maintains that the Petition should not issue in this case.

B. Ineffective Assistance of Counsel

Petitioner contends that the failure of his attorney to investigate Wallace deprived him of effective assistance of counsel. Petitioner contends that although he told his lawyer that Wallace was responsible for placing the bomb in the home and for sending threatening letters and making threatening calls to his family during the weeks preceding the trial, his lawyer failed to look further into these allegations. The court notes, however, that the only evidence of any such failure to investigate is Petitioner's own statements to that effect.

The standard for claims of ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Under the *Strickland* test, the complaining party must show both that the representation falls below an objective standard of reasonableness, and that a reasonable probability exists that absent the attorney's errors, the result of the proceeding would have been different. *Id.* at 686, 104 S. Ct. at 2068.

First, the court is uncertain as to whether a claim of ineffective assistance of counsel is properly remedied by a petition for writ of error coram nobis. Assuming, however, that ineffective assistance of counsel is a basis for relief, the court finds Petitioner has failed to carry his burden of showing ineffective assistance as set forth in *Strickland*.

The record is devoid of any mention that Petitioner informed his attorney of the identity of the alleged perpetrator. The only mention of another individual planting the bomb is a passing reference in a letter written by Petitioner on July 5, 1972. The letter referred to an "individual

who planted the bomb." No names were given. If, in fact, Petitioner never gave the name of the alleged perpetrator to his attorney, the attorney cannot be said to have fallen below a standard of objective reasonableness for failing to investigate a story of which he was not apprised.

Assuming Petitioner's contentions are true, the court cannot find that had the attorney investigated, a reasonable probability exists that the results of the trial would have been different. First, it is likely that the attorney could not have found Wallace even had he looked. Assuming Wallace had been found, it is even more likely that Wallace would have exercised his fifth amendment right to refuse to testify, or given false testimony to exonerate himself.

Accordingly, Petitioner's request for issuance of a writ of error coram nobis is hereby DENIED.

SO ORDERED, this 8 day of February, 1988.

/s/ DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEROY MOODY, JR.,	:	
Plaintiff	:	
vs.	:	CIV. ACTION
UNITED STATES OF AMERICA,	:	86-241-1-MAC(DF)
Defendant	:	CR. NO. 8951

ORDER

On February 8, 1988 this court entered an Order denying Walter Leroy Moody, Jr.'s Petition for Writ of Error Coram Nobis. Judgment was entered on the court's Order the following day. On February 12, 1988 Petitioner Moody filed a Motion for Admission of Former Juror's Affidavits. In light of the February 8th Order denying Moody's Petition, the court finds that the Motion for Admission is moot.

Apparently, Petitioner mailed his Motion for Admission to the clerk's office before receiving the court's February 8th Order. In this Motion Petitioner asks the court to consider the affidavits of two jurors from Moody's criminal trial, who state that they have listened to Julie Linn's testimony regarding Gene Wallace and have concluded that her story is true. Because the court ruled on Petitioner's writ of error coram nobis before receiving the affidavits of the two former jurors, the court will consider Petitioner's Motion as a Motion for Reconsideration.

Although Petitioner contends that *Isaacs v. Kemp*, 778 F.2d 1482 (11th Cir. 1985) supports his position that affidavits of former jurors can be considered in a writ of error coram nobis proceeding, the court finds it unnecessary to rule on the question of admissibility in the instant case. The affidavits simply state that these two jurors heard the testimony of Julie Linn and believed she was telling the truth. As pointed out by the court in its February 8th Order, however, "[e]ven if Linn's entire testimony could be taken as true, the government could have made a strong argument at trial that Petitioner knew Wallace was going to deliver the bomb." Order dated February 8, 1988, at p. 11.

Simply stated, the truth of Linn's testimony does not establish Petitioner's innocence in regard to the charge of knowingly possessing the explosive device. Petitioner could have known Wallace was going to deliver the bomb on the morning of May 7, 1972, and could have checked to see if the bomb had been delivered before he left to visit relatives on the afternoon of May 7th.

The court further notes that the testimony of two former jurors to the extent that they believed Julie Linn was telling the truth does not convince the court that ten other jurors also would have believed Linn's testimony. Furthermore, these jurors accepted Linn's testimony as true without hearing closing argument in which the government would have attempted to discredit Linn's testimony.

Therefore, the court determines that even if it were to consider the affidavits of jurors Halfacre and Phillips, the court would not be persuaded that Moody's Petition

for Writ of Error Coram Nobis should be granted. Accordingly, the court finds that Petitioner's Motion for Admission of Former Jurors' Affidavits is moot, and to the extent Petitioner's Motion has been considered as one for reconsideration, it is hereby DENIED.

SO ORDERED, this 17 day of February, 1988.

/s/ DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEROY MOODY, JR.,	:	
Plaintiff	:	
vs.	:	CA NO
	:	86-241-1-MAC(DF)
U. S. A.,	:	
Defendant	:	

ORDER

On February 8, 1988 this court entered an Order denying Petitioner Moody's request for error coram nobis relief, and on February 17, 1988 the court denied Petitioner's Motion for Reconsideration of the court's February 8th Order. Petitioner, now proceeding *pro se*, has filed a subsequent Motion for Rehearing, for Reconsideration, and for New Trial.

The court has fully considered the allegations set forth in Petitioner's most recent Motion and is of the opinion that these allegations are without merit. However, because Petitioner is proceeding *pro se* at this time and has requested that the court allow him time to secure alternate counsel, the court will give Petitioner until March 11, 1988 to find substitute counsel and to file any additional pleadings in this case.

SO ORDERED, this 29 day of February, 1988.

/s/ DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEROY MOODY, JR.,	:	
Plaintiff	:	
vs.	:	CIV. ACTION
UNITED STATES OF AMERICA,	:	86-241-1-MAC(DF)
Defendant	:	CRIM NO. 8951

ORDER

Pending before the court in the above action is Petitioner's Motion for Reconsideration and for New Trial. On February 8, 1988 this court entered an Order denying Petitioner's request for error coram nobis relief, and on February 17, 1988 the court denied Petitioner's first Motion for Reconsideration. On February 19, 1988, proceeding *pro se*, Petitioner filed a Motion for Rehearing, for Reconsideration, and for New Trial. Although the court was of the opinion at that time that the allegations set forth in Petitioner's February 19th Motion were without merit, the court gave Petitioner ten days to find substitute counsel and to file any additional pleadings in the case. Petitioner has found new counsel and has filed a supplemental brief in support of his Motion for Reconsideration and for New Trial.

Petitioner's request for a new trial can be disposed of quickly. Rule 33 of the Federal Rules of Criminal Procedure states in pertinent part:

> A motion for a new trial based on the ground of newly discovered evidence may be made *only*

before or within two years after final judgment .

. . .

Fed. R. Crim. P. 33 (emphasis added). Over fourteen years have passed since a final judgment was rendered on Petitioner's conviction. This court has no authority to grant Petitioner's request for a new trial.

Petitioner also asks the court to reconsider for a second time, its Order of February 8th denying his request for coram nobis relief. Petitioner, however, has failed to raise any new issues or persuade the court that its prior ruling was in error. Petitioner's first ground for reconsideration, ineffective assistance of counsel, was fully considered by the court in its February 8th Order. In that Order, the court noted that not only had Petitioner failed to establish ineffective assistance, but he also had failed to show that ineffective assistance of counsel, if shown, could be remedied by a petition for writ of error coram nobis. Petitioner has presented no additional authority in his supplemental brief establishing that coram nobis relief can be used to remedy a claim of ineffective assistance of counsel.

Moreover, in contending that the court should reconsider its February 8th Order and grant the relief he requests, Petitioner simply reargues the same facts the court previously considered at great length. The court has commented on these facts and the affidavits of the jurors in previous orders and will not reiterate what already has been written. Simply stated, the testimony presented in this case does not warrant the type of relief Petitioner requests.

Other district courts considering motions for reconsideration have recognized that such motions are seldom appropriate. *Proffit v. Keycom Elec. Publishing*, 625 F. Supp. 400, 409 (N.D. Ill. 1985); *Above the Belt v. Mel Bohannan Roofing, Inc.*, 99 F. R. D. 99, 101 (E.D. Va. 1983). As noted in both *Proffit* and *Above the Belt*, motions for reconsideration are not mentioned in the Federal Rules of Civil Procedure. The district court in *Above the Belt* stated that a motion for reconsideration would be appropriate in the following situations: (1) where the court has patently misunderstood a party; (2) where the court has made a decision outside the adversarial issues presented to the court by the parties; (3) where the court has made an error not of reasoning but of apprehension; or (4) where there has been a significant change in the law or facts since the submission of the issue to the court. *Above the Belt*, 99 F.R.D. at 101. The court went on to state that "[s]uch problems rarely arise and the motion to reconsider should be equally rare." *Id.*

Petitioner's Motion in the instant case is not based on any of the grounds for reconsideration mentioned in *Above the Belt*. The Motion simply asks the court to change its ruling based on the same facts and arguments presented at the February 1st hearing held in this case. The court fully understood the testimony of the parties and the issues presented at that hearing. After viewing the witnesses at trial and researching the law, the court made a reasoned decision based on the facts and the relevant authority in this area. Petitioner has failed to persuade the court that its February 8th Order was in error.

Accordingly, Petitioner's Motion for Reconsideration and for New Trial is hereby DENIED.

SO ORDERED, this 15 day of March, 1988.

/s/ DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

Appendix C

Supreme Court of the United States

No. A-367

Walter Leroy Moody, Jr.,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 18, 1990.

/s/ AMK
Associate Justice of the Supreme
Court of the United States

Dated this 15th
day of November, 1989.

Appendix D

COMPLAINT #5

PETITIONER COMPLAINS THAT HE WAS DENIED THE RIGHT TO HAVE THE EFFECTIVE ASSISTANCE OF COMPETENT COUNSEL AND THEREBY DONE SUBSTANTIAL HARM, AND HIS CONSTITUTIONAL RIGHTS WERE VIOLATED.

STATEMENT OF FACTS AND ARGUMENTS

2) Court-appointed counsel failed to provide the necessary expert witnesses and investigators to assure petitioner of a fair trial.

The Fifth Circuit Court of Appeals has acknowledged that defendant is entitled to have an expert witness to speak in defendant's behalf due to the complexity of the firearms' laws.

Petitioner's first attorney, Mr. Manley Brown, on page 31 of the Magistrate's hearing, held on May 30, 1972, said, "We obviously, to defend this type of case, it will take expert testimony, and in fairness to him, I think it would take a little time to get it together."

From June 20, 1972 to October 16, 1972, petitioner did everything in his power to get his Court-appointed counsel to provide the necessary expert witnesses and investigators. As early as July 5, 1972 Court-appointed counsel had been put on notice of the following:

(a) That petitioner's wife has been seriously injured by a bomb left in their home during their absence.

(b) That for reasons best known to the government investigators, no attempt was made to get fingerprints in

an effort to determine who had placed the bomb in petitioner's home.

(c) That while petitioner was in jail and his wife in the hospital, petitioner's home was illegally entered again.

(See EXHIBIT No. 29).

(d) That while petitioner was in jail his wife was followed on several occasions by unidentified persons which caused her concern.

(See EXHIBIT 30).

(e) That while petitioner was in jail petitioner's wife received threatening letters from Atlanta, Georgia and Texas attempting to intimidate her into silence.

(See EXHIBIT 29).

(f) That petitioner felt he know who was responsible for the crime and why petitioner had been victimized.

Court-appointed counsel was adamant in his position in that petitioner would be denied the benefit of expert witnesses and investigators notwithstanding the fact that Title 18, Section 3006A specifically makes provisions for such service, and notwithstanding the fact that said counsel had also been advised of the following:

(1) That petitioner had gone to Atlanta to see if he could determine if Tom Downing had petitioner's repossessed car for sale on Downing's car lot.

(2) That petitioner did not want Downing to know of petitioner's interest since it could prejudice petitioner's position in retrieving the automobile.

(3) That on petitioner's first trip to Atlanta, he met an old acquaintance, later referred to as Gene Wallace, at lunch and related the details of the repossession to him.

(4) That Wallace agreed to check on petitioner's car during his lunch hour, if petitioner would come back to Atlanta the following work day.

(5) That petitioner agreed and did make a second trip to Atlanta to keep his appointment with Wallace.

(6) That petitioner for the second time had lunch with Wallace.

(7) That after lunch Wallace left the diner to check on petitioner's car with the understanding that petitioner would wait for him to return.

(8) That Wallace did return and told petitioner that the car had been sold, but he had given them something to think about.

(9) That when petitioner asked what he meant, Wallace said he had called them from a pay phone and told them that someone was going to burn down their building.

(10) That petitioner was not sure if Wallace had made the call but asked Wallace if he had checked in Downing's shop area for the car. Wallace said, "No". And petitioner told him that he had requested work to be done on the car and it might have been in the shop.

(11) That Wallace agreed to check the shop if petitioner returned to Atlanta, and petitioner agreed to meet him several days later.

(12) That, shortly after petitioner's second trip to Atlanta, petitioner and his family were returning home one afternoon and noticed that his home was under surveillance by two Georgia State Patrolmen.

(13) After that incident petitioner tried for a day or two to figure it out, that is, why his house would be under surveillance, and it occurred to petitioner that Wallace probably did make the phone call he mentioned on petitioner's second trip to Atlanta. If he had, Downing might have reported it and told the police that petitioner might be responsible.

(14) That petitioner returned to Atlanta for the third time to check on his car. Petitioner met with Wallace and told him about his house being under surveillance. Wallace told petitioner that he had in fact made the call and thought the entire thing was amusing.

(15) That petitioner stated his disapproval but asked Wallace to check in the shop for petitioner's car without making any more calls.

(16) That petitioner was late for the meeting, and Wallace did not have enough time left on his lunch hour to check.

(17) That petitioner agreed to be back on time the following Monday.

(18) That on the following Monday petitioner met Wallace and it was then that Wallace suggested an extortion plot involving sending a bomb to Downing.

(19) That Wallace said he had a friend who could make bombs and they would make two bombs and take

them out of the state and mail them to Downing without any instructions for payment.

(20) That Wallace said that just like the phone call petitioner would be suspected of having done it, but would be impossible to prove it because petitioner would have no connection with it and would have been in Georgia when the packages were mailed from out of the state.

(21) That Wallace thought since petitioner would be suspected, some contact would be made in an effort to make payment.

(22) That petitioner told Wallace the only contact that he would get would be from the F.B.I., and he did not want any part of it.

(23) That Wallace tried to get petitioner to leave his mind open to the suggestion. Wallace asked petitioner to return to Macon and think about it for several days and then come back to Atlanta and let him know if petitioner had changed his mind.

(24) That petitioner returned to Macon and never returned to Atlanta.

(25) That several months later Wallace came to Macon and found petitioner by waiting where he knew petitioner would take his wife to work.

(26) That on this occasion Wallace told petitioner that he thought petitioner would go along with their plan and they already had one bomb completed and would have the other one finished soon.

(27) That petitioner told Wallace that he had not indicated to him that he would change his mind; that he would not change his mind; that petitioner would not come back to Atlanta to discuss it, and did not want Wallace to come back to Macon to see him.

(28) That Wallace told petitioner that if petitioner did not go along with them, they were going to let petitioner worry about how to get rid of the bomb, because it was too dangerous for them to take apart.

(29) That petitioner told Wallace that he did not care what they did with it because it was their problem, not his.

(30) That petitioner never saw Wallace again.

(31) That petitioner knew what kind of work Wallace did and what kind of car he drove.

It is clear, in view of all of the previous information, Court-appointed counsel should not have denied petitioner the right to investigators and expert witnesses. In so doing, said counsel denied petitioner the foundation upon which a properly prepared defense could be laid. Court-appointed counsel denied petitioner a properly prepared defense, because the material facts were never developed or presented to the Jury.

(See EXHIBIT 66).

The Court in *Powell v. State of Alabama*, 287 U.S. 45, 47; 53 S.Ct. 55, said, "Any experienced trial lawyer knows that sound strategy cannot be formulated without consultation, thorough-going investigation and preparation."

Petitioner was also denied the benefit of his wife's testimony, because the failure of Court-appointed counsel to provide investigators prevented an atmosphere of calm in which she could deliver her testimony without fear.

Prior to the trial petitioner's wife had been seriously injured by a bomb that she knew had been placed in her home by someone other than petitioner; her home had been illegally entered a second time while she was in the hospital; she had been followed on several occasions by unidentified persons after her release from the hospital; she had received several anonymous phone calls in the middle of the night regarding the case, and she had received several letters threatening her life if she talked. Yet, for some strange reason, none of the above circumstances were ever investigated.

(See EXHIBITS 29 and 30).

In *Floyd v. State*, 166 Miss. 15, 148 So. 226, 232, the Court said, "One essential factor of a fair trial is an atmosphere of calm in which witnesses can deliver their testimony without fear and intimidation, in which attorneys can assist defendants' rights, freely and fully, and in which the truth may be received and given credence without fear of violence."

It is clear that Court-appointed counsel denied petitioner a fair trial by denying petitioner the necessary investigators and expert witnesses.

3) Court-appointed counsel failed to protect petitioner's constitutional right to be represented by private counsel of his choice.

As pointed out by all of the facts and EXHIBITS in Complaint No. 4, petitioner tried for months to have Court-appointed counsel dismissed and replaced by private counsel of petitioner's choice.

Court-appointed counsel had a duty to see that petitioner was given the right to replace Court-appointed counsel with private counsel. Failure of Court-appointed counsel to safeguard this most fundamental right violated the petitioner's constitutional rights and denied him "due process".

B. TRIAL FAILURES

1) Court-appointed counsel denied petitioner a theory of defense based on the material facts.

(a) The trial transcript on pages 89-93, clearly indicates that Court-appointed counsel failed to present a theory of defense based on the material facts to the jury in his opening statement.

In *Speer v. Shipley*, 149 Kan. 15, 86 P. 2d, 999, 1001, the Court defined an opening statement as an outline of anticipated proof.

In *State v. Erwin*, 101 Utah 365, 120 P. 2d 285, 313, the Court said, "Its purpose is to advise the jury of facts relied upon and of issues involved, and to give the jury a general picture of the facts and the situation, so that the jury will be able to understand the evidence."

It is clear from Section A-2 of Complaint #5 that said counsel had sufficient information to require expert witnesses and investigators be used to assure petitioner that he would have a theory of defense based on the material

facts presented to the jury in the opening statement. The failure of counsel to provide said theory of defense denied the jury of a general picture of the situation and rendered the opening statement deficient and ineffective.

(b) The transcript also indicates that Court-appointed counsel did not develop a theory of defense based on the material facts during the trial. The absence of a theory of defense is exemplified near the end of the trial when a very experienced trial judge felt the need to make the following statement: "What is his defense?" See Page 367 of trial transcript. It is not reasonable to think that the jury could figure out what petitioner's theory of defense was, if an experienced judge could not.

On direct examination petitioner was prevented from establishing his theory of defense because it involved conversations between petitioner and Gene Wallace. This was ruled unacceptable hearsay. See pages 366-369 of trial transcript.

Court-appointed counsel failed to protect petitioner's right to a theory of defense by not showing that the conversations related directly to explaining the conduct of petitioner, which was in issue.

The result of these failures was to put petitioner in a situation where on one hand he was required to explain possession to the satisfaction of the jury or be found guilty and on the other hand barred from explaining possession because of the hearsay rule.

In *Stump v. Bennett*, 398 F. 2d 111, the Court held, "Any deterrent to the right to be heard in full and to offer evidence in defense of life or liberty violates the oldest

and deepest rooted foundation of due process .... Every person is entitled to full protection of due process and equal protection of the laws fundamental to a fair trial, particularly when life or liberty is involved .... State cannot withhold right to full protection of due process and equal protection of the laws fundamental to a fair trial from some defendants and grant them to others similarly situated."

(c) The trial transcript on pages 445-461 indicates that Court-appointed counsel did not relate a theory of defense based on the material facts during the summation to the Jury.

(d) Court-appointed counsel failed to provide a charge that included a theory of defense. See pages 470-486 of trial transcript.

Petitioner's right to a charge including a theory of defense is settled.

In *Strauss v. U. S.*, (5th Cir., 1967), 376 F.2d 416, the Court said, "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." *Perez v. United States*, (5th Cir., 1961), 297 F.2d 12, 13-14. (Emphasis added). We find no requirement that a requested charge encompasses, in the trial judge's eyes, a believable or sensible defense. The judge is the lawgiver. He decides whether the facts constituting the defense framed by the proposed charge, if believed, by the jury, are legally sufficient to render the accused innocent. The jury is the fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to

charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the Trial Judge directs a verdict on that issue against the defendant. This is impermissible. *Bryan v. United States,* (5th Cir., 1967), 373 F.2d. 403. The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defenses which the jury may choose to believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at the trial, then the Trial Judge may not refuse to charge on that defense. In *Tatum v. United States,* 1950, 88 U. S. App. D. C. 386, 190 F.2d 612, 617, the D. C. Circuit said: "We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for in criminal cases the defendant is entitled to have presented instructions related to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own." SEE *Levine v. United States,* 1958, 104 U.S. App. D.C. 281, 261 F.2d 747; *Perez v. United States,* supra; *Smith v. United States,* (6th Cir.,), 230 F.2d 935; *United States v. Indian Trailer Corp.* (7th Cir., 1955), 226 F.2d 595; *Merrill v. United States* (5th Cir., 1964), 338 F.2d 763; *Koontz v. United States* (5th Cir., 1960), 277 F.2d 53; *Rivera v. United States,* (D.C. Cir., 1966), 361 F.2d 553.

It is clear that from beginning to end petitioner was denied a theory of defense based on the material facts. It is not reasonable to think that this denial failed to do peti-

tioner substantial harm and violate his constitutional rights.

Appendix E

Williams & Associates
POLYGRAPH SERVICES/INVESTIGATION
700 Somerset Terrace N.E., Atlanta, GA 30308
(404) 874-6212

Polygraph Examination Report

SUBJECT: Julie A. Linn

BIRTHDATE: November 27, 1956

EXAMINATION DATE: May 20, 1986

TYPE EXAMINATION: Specific

RELEVANT QUESTIONS:

1. Q In your affidavit of May 19, 1986 concerning Gene Wallace, did you tell the truth in each of the seventy assertions contained therein?

   A Yes.

2. Q In your affidavit of May 19, 1986 concerning Gene Wallace, did you deliberately lie in any of the seventy assertions contained therein?

   A No.

3. Q Are all the assertions in your affidavit of May 19, 1986 concerning Gene Wallace Completely true?

   A Yes.

CONCLUSION: No deception was indicated to any relevant question.

EXAMINER DATE 5/22/86

/s/ EDWARD WILLIAMS, PRESIDENT
LICENSE NUMBER 309

STATE OF GEORGIA,

COUNTY OF FULTON,

AFFIDAVIT OF EDWARD A. WILLIAMS

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Edward A. Williams and after first being duly sworn, deposes and says that the following assertions are both true and correct.

1.

I have administered over thirteen thousand polygraph examinations since being licensed by the Georgia State Board of Polygraph Examiners.

2.

On May 20, 1986, I administered a specific polygraph examination to Julie A. Linn.

3.

The examination consisted of two polygrams of the same questions.

4.

The examination report and Julie A. Linn's affidavit of May 19, 1986 concerning Gene Wallace is attached hereto as Exhibit One and Two respectively.

5.

A careful study and evaluation of the charts by this examiner shows no deception was indicated to any relevant question.

/s/ EDWARD A. WILLIAMS
POLYGRAPH EXAMINER

The foregoing was subscribed and sworn to before me by Edward A. Williams this ___ day of _____, 1986.

(SEAL)

NOTARY PUBLIC
My commission expires _____

PETITIONER'S EXHIBIT #1

STATE OF GEORGIA,

COUNTY OF COBB,

AFFIDAVIT OF JULIE A. LINN

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Julie A. Linn and after first being duly sworn, deposes and says that the following assertions are both true and correct.

1.

Around the last part of April, 1972, my mother and I went to Atlanta to look for a house. We were staying in a motel and eating out.

2.

On one particular occasion when we were going into a restaurant, I met Gene Wallace. He was about eighteen or nineteen years old, and said he was going into the service.

3.

Later that night he called me at the motel and asked me for a date. After a lot of begging on my part, my mother said I could go out with him for a short while the next day.

4.

When Gene picked me up, we just rode around Atlanta, got something to eat and then he took me back to the motel.

5.

He had a nice looking car that looked fairly new but I can't recall what type it was.

6.

Several days later, we got together again and did the same thing.

7.

On May 7th, the third date we had together, Gene took me to Macon on what I thought was just another pleasure trip.

8.

I remember the date because it was the Sunday before Mother's Day, and my mother and I were scheduled to leave Atlanta on Monday.

9.

When we reached Macon, Gene said he wanted to see some man before we left.

10.

After Gene took me to lunch, we drove to the man's house.

11.

Gene knocked on the front and side doors but no one was home. So we rode around town for a short while before returning to the house.

12.

Gene knocked on both doors again, but still there was no answer. We left and drove around town again for about an hour.

13.

I had not told my mother that I was going out of town, and I was getting concerned about the time.

14.

I told Gene that I needed to get back to the motel before long because my mother would be concerned if I did not return when she requested.

15.

We returned to the house for a third time, and Gene knocked on both doors again. Still there was no answer.

16.

He opened the carport door but did not go in. Gene then came back to the car and said, "I want to leave a package."

17.

He reached in the back seat of his car and got a package that was wrapped in brown paper and was partially covered by a rag.

18.

The package was small and had some writing on it and several stamps on it, like it was to be mailed.

19.

Gene said, "I'll just leave this in the house and call him when I get back home."

20.

Gene went into the house with the package, and several minutes later he returned without the package, but had the rag still in his hand.

21.

We then started back to Atlanta and had been driving for about twenty minutes when Gene said, "Damn, I've got to go back and get that package. I forgot he doesn't have a phone! I can't call him."

22.

We then drove back to the house again. When we turned onto the street the house was on, I saw I guess eight or ten people in the front yard and several more people running in the street toward the house.

23.

Gene screamed, "Oh my God, it blew up!"

24.

I said, "Do you mean the package you left?"

25.

He said, "Yeah!"

26.

I started asking him questions about it but he became very angry and told me to shut up.

27.

We drove right by the house and started back to Atlanta.

28.

When we were returning, I kept trying to get Gene to tell me what was going on.

29.

All of a sudden he hit me in the face with the back of his hand. He pulled onto the side of the road and started hitting me in the face with his fist.

30.

I could not get away or do anything to defend myself. At that point, I was crying and screaming.

31.

He kept yelling at me, "I told you to shut up!"

32.

He finally quit beating me but threatened me and told me, "If you ever say anything about today you will live to regret it!"

33.

The helplessness I felt when Gene was beating me was the most terrifying experience I've ever had. For awhile, he was a crazy person, and there was nothing I could do to protect myself.

34.

When we returned to Atlanta, I was scared to death of him.

35.

I also knew that my mother was against me going out in the first place. If I had told her what had happened with Gene, she would have been even more protective, and I would have been unable to go anywhere again.

36.

Consequently, I kept quiet about the events of that day.

37.

The following day, my mother and I left Atlanta in route back to Wisconsin.

38.

I never saw Gene Wallace again.

39.

In 1977, we moved to Atlanta.

40.

On several occasions in the following years, I had terrible nightmares about the helpless feeling I had when Gene beat me up. I have awaken several times in the middle of the night crying and screaming.

41.

Sometime around February of this year, I had another nightmare about the beating. After finally dis-

cussing the event with my mother, she suggested that we go to Macon to see if we could find out what happened on May 7, 1972 by looking through the newspapers of that time.

42.

About a month ago, my mother and I went to the Macon library and found several newspaper articles about a "Mysterious blast" that occurred on May 7, 1972 on Dublin Avenue.

43.

The paper said Mrs. Moody suffered injuries and Walter Leroy Moody had later been sentenced to a five year jail term for possessing a homemade bomb.

44.

I did not know the address where Wallace had left the package, so my mother and I got a city map of Macon and located Dublin Avenue.

45.

I recognized the house at 1360 Dublin Avenue as the one where Gene had left the package the day of the explosion.

46.

For the first time, I knew a crime had been committed, someone had been injured and someone had been arrested and sentenced to prison.

47.

I found myself sympathizing with Mrs. Moody. If I had been injured because someone had left a bomb in my house, I would want all the information I could get about it. I felt I had an obligation to tell Mrs. Moody everything I knew.

48.

I also felt that if I could tell someone about what I knew, it might ease my mind, and I might not have anymore nightmares about Gene Wallace.

49.

I decided to try to locate Mrs. Hazel Moody. I checked in the Macon-Warner Robins phone book for her or Mr. Walter Leroy Moody, Jr. Neither was listed.

50.

I then called all the Moodys in Macon trying to locate them. No one knew them.

51.

I then tried the Moodys listed in Warner Robins. One of the Moodys in Warner Robins told us there was a Leroy Moody in Fort Valley, Georgia.

52.

I got the number from information and called it. An elderly lady answered the phone. I asked for Walter Leroy Moody, Jr. She said he lived in Atlanta and gave me his number.

53.

My mother and I returned to Atlanta, and the following day I called the number given to me by the lady in Fort Valley.

54.

A man answered the phone, and I asked to speak to Hazel. He said I had the wrong number.

55.

I told him I had called Leroy Moody in Fort Valley and had been given the number as being that of Walter Leroy Moody, Jr.

56.

He said he was Walter Leroy Moody, Jr. but he and Hazel had been divorced for ten years.

57.

I told him I had information about the homemade bomb that injured her in 1972, and I wanted to locate her.

58.

He said he had no way of contacting her but said he would like to know what I was talking about.

59.

I told Mr. Moody that I had read in the newspaper where he had been sentenced to five years in prison because of the bomb, and I did not feel comfortable talking to him about it.

60.

He told me he did not commit the crime and was out of town when the bomb exploded that day. He said he did not know it was in their house until someone called him at his mother's in Fort Valley after it exploded.

61.

I was kind of afraid to get involved with him so I told him I would probably give the information to an attorney to pass on to him.

62.

Mr. Moody asked me for my name and phone number but I refused him this information.

63.

After failing to locate Hazel Moody, I spent the last month trying to decide what to do.

64.

Finally, I decided to go back to Macon and copy the newspaper articles I had read and turn all the information over to an attorney who would pass it on to Mr. Moody.

65.

I wrote down everything I could remember about the matter and took it to an attorney. The attorney cautioned me against providing Mr. Moody with the information, especially until he had signed a release agreeing not to take any legal action against me.

66.

I later called Mr. Moody and told him that if he would sign a release agreeing not to take any kind of legal action against me I would release the information I had to an attorney who could pass it on to him.

67.

Mr. Moody said he would sign a release and asked me for my name and number so he could have his attorney contact me.

68.

I again refused to give my name and number to Mr. Moody but told him I would call within a day or two to get the name and number of his attorney.

69.

When I called Mr. Moody back, he gave me the name of his attorney. I called his attorney and made an appointment to pick up the release.

70.

After I received the release signed by Mr. Moody, I turned over all the information I had to his attorney.

The foregoing was subscribed and sworn to before me by Julie A. Linn this ___ day of _____, 1986.

(SEAL)

NOTARY PUBLIC
My commission expires _____

Appendix F

Williams & Associates
POLYGRAPH SERVICES/INVESTIGATION
700 Somerset Terrace N.E., Atlanta, GA 30308
(404) 874-6212

Polygraph Examination Report

SUBJECT: Walter Leroy Moody, Jr.

BIRTHDATE: March 24, 1934

EXAMINATION DATE: May 19, 1986

TYPE EXAMINATION: Specific

RELEVANT QUESTIONS:

1. Q Were all the assertions you made in your May 16, 1986 affidavit concerning Gene Wallace completely true?

   A Yes.

2. Q In your affidavit of May 16, 1986 concerning Gene Wallace, did you tell the truth in each of the six assertions contained therein?

   A Yes.

3. Q In your affidavit of May 16, 1986 concerning Gene Wallace, did you deliberately lie in any of the six assertions contained therein?

   A No.

CONCLUSION: No deception was indicated to any relevant question.

EXAMINER DATE 5/22/86

/s/ EDWARD WILLIAMS, PRESIDENT
LICENSE NUMBER 309

STATE OF GEORGIA

COUNTY OF FULTON,

AFFIDAVIT OF EDWARD A. WILLIAMS

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Edward A. Williams and after first being duly sworn, deposes and says that the following assertions are both true and correct.

1.

I have administered over thirteen thousand polygraph examinations since being licensed by the Georgia State Board of Polygraph Examiners.

2.

On May 19, 1986, I administered a specific polygraph examination to Walter Leroy Moody, Jr.

3.

The examination consisted of two polygrams of the same questions.

4.

The examination report and Walter Leroy Moody, Jr.'s affidavit of May 16, 1986 concerning Gene Wallace is attached hereto as Exhibits One and Two respectively.

5.

A careful study and evaluation of the charts by this examiner shows no deception was indicated to any relevant question.

/s/ EDWARD A. WILLIAMS
POLYGRAPH EXAMINER

The foregoing was subscribed and sworn to before me by Edward A. Williams this ___ day of _____, 1986.

(SEAL) NOTARY PUBLIC
My comission expires_____

PETITIONER'S EXHIBIT #2

STATE OF GEORGIA,

COUNTY OF CLAYTON,

AFFIDAVIT OF WALTER LEROY MOODY, JR.

Personally appeared before the undersigned attesting officer, duly authorized to administer oaths, Walter Leroy Moody, Jr. and after first being duly sworn, deposes and says that the following assertions are both true and correct.

1.

At no time, did I ever state or imply to Gene Wallace that I would plan or participate in any illegal act with him or anyone else.

2.

At no time, did I ever tell or otherwise advise Gene Wallace that I lived at 1360 Dublin Avenue, Macon, Georgia.

3.

At no time, did I ever authorize Gene Wallace to leave a bomb at 1360 Dublin Avenue, Macon, Georgia.

4.

At no time prior to the bomb explosion of May 7, 1972, did I know a bomb had been in the house at 1360 Dublin Avenue, Macon, Georgia.

5.

At no time, did I ever intend to harm Hazel Moody with a bomb.

At no time, have I ever possessed a bomb, explosive device or unregistered firearm of any kind.

/s/WALTER LEROY MOODY, JR.

The foregoing was subscribed and sworn to before me by Walter Leroy Moody, Jr. this ___ day of _____, 1986.

(SEAL)

NOTARY PUBLIC
My commission expires _____